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that the engine was emitting smoke and making noise to such an extent that plaintiff could have seen and heard it, since such evidence was admissible not only to show plaintiff's contributory negligence, but also in rebuttal of the negligence charged by the declaration in obstructing the view of the track by the coal cars, and in operating its train without warning.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 135.]

**7. Negligence (§ 119 (6)\*)—Instruction Excluding Defendant's Evidence of Contributory Negligence Not Pledged Held Correct.**—Where defendant failed to comply with the requirements of Code 1919, § 6092, with reference to pleading contributory negligence, and there was no waiver of the statute, the defense was limited to plaintiff's failure to show the injury was proximately caused by defendant's negligence, or to the contributory negligence of plaintiff as disclosed by his own testimony; and, where those defenses were fully and fairly submitted to the jury, it was not error to give an instruction to disregard all of defendant's evidence bearing on contributory negligence.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 135.]

**8. Negligence (§ 119 (6)\*)—Contributory Negligence Not Pledged Cannot Be Proved by Defense without Amendment.**—A defendant cannot avoid the effect of Code 1919, § 6092, requiring him to plead contributory negligence, by claiming the facts with reference thereto were unknown to him before he heard plaintiff's testimony at the trial, and thereby obtain the right to introduce evidence as to such negligence in violation of the provisions of the statute, but his remedy in such a case would be either by application for a continuance, or by application under section 6104 to amend his answer to meet the situation disclosed, which could be granted either with or without a continuance.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 406.]

Error to Circuit Court, Greensville County.

Action by C. M. Brown against John Barton Payne, Director General of Railroads, operating the Virginian Railroad. Judgment for plaintiff, and defendant brings error. Affirmed.

*Walter C. Plunkett*, of Roanoke, and *Williams, Loyall & Tunstall*, of Norfolk, for plaintiff in error.

*Jno. N. Sebrell, Jr.*, of Norfolk, and *E. Peyton Turner*, of Emporia, for defendant in error.

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#### PERKINS v. DIRECTOR GENERAL OF RAILROADS.

June 15, 1922.

[112 S. E. 839.]

#### 1. Appeal and Error (§ 1002\*)—Conflicts in Evidence are Settled

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

**Adversely to Defendant by Verdict for Plaintiff.**—All conflicts in the testimony are settled adversely to defendant by a verdict for plaintiff.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 620.]

**2. Railroads (§ 350 (22)\*)—Contributory Negligence of Driver of Horse and Buggy Held for Jury.**—Evidence held not to show that a woman driving a horse hitched to a buggy struck by a train approaching without warning was contributorily negligent as a matter of law in approaching the crossing from which her view of the train, running at high speed, contrary to the ordinance, was obstructed until her horse was almost upon the track.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 142.]

**3. Evidence (§ 383 (10)\*)—Photographs Have No Greater Weight than the Testimony on Which Their Accuracy Depended.**—Photographs of the scene of a railroad crossing accident, which were taken when there were no leaves on the trees, and no vegetation, as at the time of the accident, and which depended for their accuracy as to locations, distances, and other particulars upon human testimony, were not entitled to more weight than other evidence for the defendant in conflict with that relied upon by the plaintiff.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 142.]

Error to Hastings Court of Petersburg.

Action by Hattie E. Perkins against the Director General of Railroads. There was a judgment for defendant after verdict for plaintiff was set aside, and plaintiff brings error. Reversed, and final judgment entered for plaintiff for the damages fixed by the verdict.

*R. H. Mann*, of Petersburg, for plaintiff in error.

*Mann & Townsend*, of Petersburg, for defendant in error.

VIRGINIA RY. & POWER CO. *v.* OLIVER.

June 15, 1922.

[112 S. E. 841.]

**1. Trial (§ 139 (1)\*)—Demurrer to Evidence Properly Overruled Where Evidence Will Support Finding Either Way.**—Where the evidence in an action against a street car company for personal injuries to the driver of a wagon was such that a jury might properly have found either for or against the plaintiff on the issue of contributory negligence, defendant's demurrer to the evidence was properly overruled.

[Ed. Note.—For other cases, see 4 Va. W. Va. Enc. Dig. 536.]

**2. Street Railroads (§ 99 (9)\*)—Driver Can Assume Street Car Will Observe Speed Limits.**—The driver of horse and wagon approach-

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.